U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF C-T-S-, INC.

DATE: SEPT. 6, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of residential construction and remodeling services, seeks to employ the Beneficiary as a financial analyst. It requests her classification under the second-preference immigrant category as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Texas Service Center denied the petition's approval. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage of the offered position.

On appeal, the Petitioner submits additional evidence. The company also asserts that the Director disregarded wages it paid to the Beneficiary and other factors demonstrating its ability to pay the proffered wage.

Upon *de novo* review, we will dismiss the appeal.

## I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the requested visa classification. If USCIS grants a

petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners with less than 100 employees, like the Petitioner here, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the proffered wage, USCIS next considers whether it generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the actual wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[1]

Here, the labor certification states the proffered wage of the offered position of financial analyst as $78,562 a year. The petition's priority date is July 15, 2017, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d (explaining how to determine a petition's priority date).

The record indicates the Petitioner's employment of the Beneficiary in nonimmigrant work visa status beginning in 2015. The Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, showing that it paid the Beneficiary $38,178 in 2017 and $48,860 in 2018. The Petitioner asserts, however, that, in 2017, it paid the Beneficiary $44,464. That is the year-to-date, gross pay amount reflected on a copy of the Beneficiary's payroll record as of November 11, 2017. The Petitioner, however, has not explained or documented why the Form W-2 and the payroll record state different wage amounts for the Beneficiary. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). We therefore decline to credit the Petitioner with paying the Beneficiary more than the $38,178 amount listed on the Form W-2.

Neither Form W-2 amount, $38,178 for 2017 nor $48,860 for 2018, equals or exceeds the annual proffered wage of $78,562. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage. But we credit the Petitioner's payments. It need only demonstrate its ability to pay the annual differences between the proffered wage and the actual wages paid, or $40,384 in 2017 and $29,702 in 2018.

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Four Holes Land & Cattle, LLC v Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715 (D.S.C. Sept. 9, 2016).

The Petitioner also submitted copies of its federal income tax returns for 2017 and 2018. The 2018 returns reflect net income of $30,636 and net current assets of $40,946. Both amounts exceed the $29,702 difference between the proffered wage and actual wages paid that year. Thus, based on net income or net current assets, the Petitioner has demonstrated its ability to pay the proffered wage in 2018.

The Petitioner's tax returns for 2017, however, report net income of $24,278 and net current assets of $25,199.[2] Both of these amounts fall short of the $40,384 difference between the proffered wage and actual wages paid that year.[3] Thus, based on examinations of the Petitioner's wage payments to the Beneficiary, its net income, and its net current assets, the company has not demonstrated its ability to pay the proffered wage in 2017, the year of the petition's priority date.

On appeal, the Petitioner asserts that the record demonstrates its ability to pay in 2017. Combining its wage payments to the Beneficiary ($38,178), its net income ($24,278), and its net current assets ($25,199) for that year, the Petitioner argues that it had more than $87,000 available to pay the proffered wage of $78,562. Net income and net current assets, however, are not cumulative. Net current assets are expected to be available over a *coming* year. *See* Siegel & Shim, *supra* n.2, at 117 (stating that current assets are those that can be liquidated within a year). In contrast, net income represents funds remaining from a *prior* period. Because net current assets and net income measure assets over different time frames, combining the amounts is not meaningful. Moreover, adding net income and net current assets would "double-count" certain assets, including cash and, under the accrual method of accounting, accounts receivable. We therefore reject the Petitioner's claimed demonstration of its ability to pay in 2017 by combining its net income and net current assets.

As the Petitioner also argues, however, in determining its ability to pay the proffered wage, USCIS must look beyond wages paid, net income, and net current assets. Under *Sonegawa*, we may consider additional factors, including: how long the Petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay the proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

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[2] The Petitioner asserts that it generated net current assets of $33,925 in 2017. The record, however, does not support that contention. Net current assets equal current assets (such as cash, accounts receivable, inventories, and other assets that can be liquidated within a year) minus current liabilities (such as accounts payable and other liabilities due within a year). Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). The Petitioner's 2017 tax returns report cash of $10,913 and other current assets of $22,451 at year's end for a total current asset amount of $33,364. The returns also reflect total current liabilities of $8,165. Thus, subtracting current liabilities from current assets yields net current assets of $25,199. The Petitioner appears to mistake its net current assets for its total amount of assets, which the 2017 tax returns report as $33,925.

[3] Even if we credited the Petitioner with paying the Beneficiary wages of $44,464 in 2017 as indicated on the payroll documentation, the record would not establish the company's ability to pay the proffered wage. The difference between the annual proffered wage of $78,652 and $44,464 would equal $34,188. That amount would still exceed the Petitioner's reported net income of $24,278 and net current assets of $25,199 in 2017.

Here, the record indicates the Petitioner's continuous business operations since 2006 and, as of the second quarter of 2018, its employment of four people.[4] Copies of the Petitioner's federal income tax returns, however, indicate that its gross annual revenues and labor costs have dropped since 2015. Also, unlike the petitioner in *Sonegawa*, the record here does not establish the Petitioner's possession of an outstanding reputation in its industry or its incurrence of uncharacteristic losses or expenses.

The Petitioner asserts that the Beneficiary's wait for an employment authorization document from USCIS prevented the company from legally employing her at the beginning of 2018. *See* 8 C.F.R. § 274a.12(c)(9) (allowing applicants for adjustment of status to apply for employment authorization). As a result, the Petitioner's president stated that the company paid a consulting firm $31,864 to perform the Beneficiary's duties as a financial analyst from January 2018 to May 2018. Copies of the Petitioner's federal income tax returns and a profit-and-loss statement for 2018 reflect the company's incurrence of more than $54,000 in professional fees. The unaudited, profit-and-loss statement also details consulting fees of $31,864 consistent with the president's letter. But the record lacks copies of invoices from the consulting firm or other documentation establishing the Petitioner's payment of the claimed consulting fees and the nature of the consulting services provided. Moreover, the Petitioner has already demonstrated its ability to pay the proffered wage in 2018.

The Petitioner also submits a copy of one of our non-precedent decisions from 2009, ruling that an I-140 petitioner demonstrated its ability to pay a proffered wage. The decision found that a totality of the circumstances - specifically the size of the petitioner's operations, the longevity of its business, and the beneficiary's replacement of a $60,000-a-year, outsourced service - demonstrated its ability to pay the annual proffered wage of $60,070. We need not follow that decision in this matter, however. *See* 8 C.F.R. § 103.10(b) (stating that only precedent decisions bind USCIS employees in proceedings involving the same issues). Moreover, the facts of the 2009 case distinguish it from this case. There, the decision states that the petitioner generated more than $2.5 million in annual sales and conducted business for more than 40 years. The Petitioner here generated only about $500,000 in revenues in 2018 and has conducted business for less than 15 years. Also, the 2009 petitioner demonstrated that the beneficiary's replacement of an outsourced service would have saved funds to pay the proffered wage in a relevant year. Here, as previously indicated, the Beneficiary's replacement of outsourced consulting services in *2018* would not have preserved funds to pay her proffered wage in *2017*. Our non-precedent decision therefore does not support the Petitioner's ability to pay the proffered wage.

A totality of the circumstances under *Sonegawa* does not demonstrate the Petitioner's ability to pay the proffered wage. Thus, contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner has not demonstrated its ability to pay from the petition's priority date onward. We will therefore affirm the petition's denial.

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[4] Counsel states that the Petitioner began operations in 2004. Counsel's assertion, however, does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The record must substantiate counsel's statement with independent evidence, which may include affidavits and declarations. In a letter, the Petitioner's president stated that he founded the business in 2006. A preponderance of evidence therefore establishes the Petitioner's continuous business operations since only 2006.

## III. REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish that the Beneficiary met the minimum experience requirements of the offered position. A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of a position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of financial analyst as a U.S. master's degree in business administration and two years of experience "in the job offered." The phrase "in the job offered" on the labor certification means experience performing the key duties of the offered position. *Matter of Symbioun Techs., Inc.*, 2010-PER-01422 *2 (BALCA Oct. 24, 2011) (citations omitted).

On the labor certification, the Beneficiary attested that, by the petition's priority date of July 15, 2017, and before beginning employment with the Petitioner in the offered position in April 2015, she gained about three years of qualifying experience.[5] She stated that, from December 2011 to December 2014, she worked as a financial analyst for a U.S. limited liability company (LLC) that makes, installs, and repairs doors.

To support claimed employment experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(g)(1). The letter must include the employer's name, address, and title, "and a specific description of the duties performed by the alien." *Id.* In response to the Director's written request for additional evidence, the Petitioner submitted a 2018 letter from the LLC's purported vice president/owner. The letter states the LLC's employment of the Beneficiary as a financial analyst over the specified three-year period and recommends her as an employee. Contrary to 8 C.F.R. § 204.5(g)(1), however, the letter does not include "a specific description of the duties performed by the alien." Without a description of the Beneficiary's former duties, the record does not establish her possession of the requisite experience "in the job offered."

Also, public records cast doubt on the validity of the LLC's letter and the Beneficiary's claimed experience with the company. Online Virginia records indicate the cancellation of the LLC's existence in August 2012. *See* Va. State Corp. Comm'n, "Business Entity Search," https://sccefile.scc.virginia.gov/Find/Business (last visited Aug. 29, 2019); *see also* Va. Code § 13.1-1050-2 (listing circumstances that automatically cancel a Virginia LLC's existence). The LLC's cancellation casts doubt on whether the business continued to operate after August 2012. The date of the cancellation also casts doubt on the validity of the LLC's 2018 letter and the Beneficiary's

[5] A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience occurred in a position substantially different than the offered one or the employer can demonstrate the impracticality of training a U.S. worker for the job. 20 C.F.R. § 656.17(i)(3). The Petitioner here does not assert its reliance on experience that the Beneficiary gained with it.

claim that the company employed her until December 2014. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). In any future filings in this matter, the Petitioner must therefore submit additional evidence documenting the Beneficiary's claimed, qualifying experience in the job offered.

## IV. CONCLUSION

Contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner has not demonstrated its continuing ability to pay the proffered wage of the offered position from the petition's priority date onward. We will therefore affirm the Director's decision.

**ORDER:** The appeal is dismissed.

Cite as *Matter of C-T-S-, Inc.*, ID# 5982562 (AAO Sept. 6, 2019)